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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE
APPLICATION FOR BENEFICIAL
WATER USE PERMIT 40A-107356 BY
HENSEL LAND PARTNERSHIP

FINAL
ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the November 13, 2000, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application For Beneficial Water Use Permit 40A-107356 by Hensel Land Partnership is hereby DENIED.

NOTICE

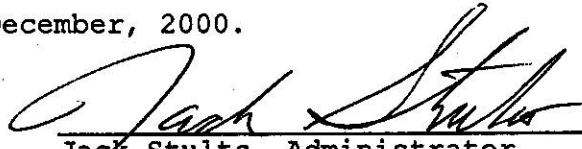
The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements

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the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 29th day of December, 2000.



Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Final Order was duly served upon all parties listed below this 29th day of December, 2000.

HENSEL LAND PARTNERSHIP
PO BOX 58
HARLOWTON, MT 59036

~~JAMES A HUBBLE~~
~~PO BOX 556~~
~~STANFORD, MT 59479~~

JULIE FRITZ
PO BOX 236
CHESTER, MT 59522

CURT MARTIN, CHIEF
WATER RIGHTS BUREAU
DEP'T. OF NATURAL RESOURCES AND CONSERVATION
PO BOX 201604
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SCOTT IRVIN, RM
ANDY BRUMMOND, WRS
LEWISTOWN REGIONAL OFFICE
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613 NE MAIN, SUITE E
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Jennifer L. Hensley
Hearings Unit

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
40A-107356 BY HENSEL LAND)	DECISION
PARTNERSHIP)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on April 14, 2000, in Harlowton, Montana, to determine whether a beneficial water use permit should be issued to Hensel Land Partnership for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (1999).

APPEARANCES

Applicant Phillip G. (Tony) Hensel appeared at the hearing in person for Hensel Land Partnership.

Objector Julie Fritz appeared at the hearing in person and by and through counsel, James A. Hubble. Mike Youderian, Youderian Construction, Inc., appeared as a witness for Objector Fritz.

Andy Brummond, Water Resources Specialist with the Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Objector.

EXHIBITS

Applicant offered no exhibits for the record. Objector offered three exhibits for the record which were admitted.

Objector's Exhibit J consists of a one page note to Julie Fritz from the well driller of a well drilled in 1973 about 30' from Galloway Creek. The note includes his drilling log for the well.

Objector's Exhibit P consists of a photograph of the Fritz dam shoreline taken in October 1999.

Objector's Exhibit Q consists of a photograph of the Fritz dam outlet structure taken in October 1999.

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PRELIMINARY MATTERS

The hearings examiner requested an estimate of the evaporation from the proposed pond from Andy Brummond of the Lewistown Water Resources Regional Office. Such estimates are typical for the Department staff. Mr. Brummond's estimate is 42 inches of evaporation from the 0.8 surface acres, or 2.8 acre-feet per year.

The hearings examiner ordered the record reopened to allow Applicant to provide written justification, from a qualified source, for the volume of water requested. Such information was due October 13, 2000. No information was received. Failure to present the requested information results in an order being entered in conformity with the existing record.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 40A-107356 in the name of Hensel Land Partnership and signed by Phillip G. Hensel was filed with the Department on June 11, 1999.
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate up to 5.70 acre-feet of water per year from Galloway Creek at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, Township 11 North, Range 17 East, Wheatland County, Montana. The proposed means of diversion is a dam. The proposed period of appropriation is from January 1 to December 31, inclusive of each year. The proposed use is fish and wildlife. The proposed place of use is an onstream reservoir with a capacity of 2.9 acre-feet located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 25. The projected annual pond evaporation is 2.8 acre-feet. (Department file, testimony of Tony Hensel)
4. Applicant has proven water is physically available in years of normal runoff. The application is for an annual volume of water, and

requests no flow rate. The Galloway Creek drainage basin above the proposed diversion will produce runoff volumes of 133 acre-feet in average years. In normal precipitation years Galloway Creek runs on the surface upstream and downstream of the proposed pond site. In low water years, the pond will fill with spring runoff. During the recent drought the stream has been drying up at the pond site in July. Objector's downstream reservoir was full on April 14, 2000.

(Department file, Testimony of Tony Hensel, Julie Fritz)

5. Applicant has proven the water is legally available when the proposed pond can be fully drained after a legitimate call for the water. In years of normal precipitation when Galloway Creek flows upstream and downstream of the proposed pond, the pond is a flow-through, or non-consumptive, pond after the initial fill of 2.9 acre-feet and annual evaporative losses of 2.8 acre-feet. Applicant showed 133 acre-feet of water is available. Applicant did not compare the downstream demand from existing water rights with the 133 acre-feet that is physically available. Applicant relies on the trickle tube device to pass through all inflow to the pond to show he would not affect downstream appropriators in normal precipitation years.

There are water rights exceeding 240 acre-feet from Galloway Creek within two miles downstream of the proposed pond site. The record does not contain evidence of a history of senior right holders calling the source, water commissioner appointment, or other history of problems on the source. Objector claimed that based on her water right period of appropriation, she should be able to irrigate until September 10 of each year. Objector has not been able to do that in recent years. Water availability is dependent upon precipitation runoff, and the ability of upstream junior appropriators to stop diversion after a call by a downstream senior appropriator. To be non-consumptive in dry years, and honor a call on the source from a downstream senior reservoir, the proposed pond must have a drainage device which can fully drain the pond. (Department file, Department records, testimony of Tony Hensel, and Julie Fritz)

6. Applicant has proven there would be no adverse effect to the water rights of prior appropriators under an existing water right,

certificate, permit, or state water reservation if a drainage device is installed that can fully drain impounded water that should have been allowed to flow downstream. Applicant has agreed to install a permanent drainage device adequate to satisfy existing rights.

(Department file and records, Testimony of Tony Hensel)

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. The project is designed and will be constructed by a person knowledgeable in the safe design and construction of earth embankment ponds and drainage device installation. Applicant's contractor has over twenty years experience including the construction of ponds. The dam will consist of an embankment which has three foot (3') of core excavation under the embankment. The core will be filled in during the placement of the embankment, leaving a six foot (6') embankment above ground. There will be no pit in the bottom of the pond.

(Department file, testimony of Tony Hensel, Mike Youderian)

8. Applicant has not proven the proposed use of water for a private fish pond is beneficial. Applicant proposes to stock the pond with fifty fish of an unknown species, and apply for a private fish pond license if a water right for the pond is issued. However, the record lacks explanation of why the quantity of water proposed for this use is required for fifty fish, and how the fishery will be viable in years when the source does not flow at the pond. If the fish can not survive, diversion of water to the pond is not beneficial. (Testimony of Tony Hensel, Department file, and Memorandum [below])

9. Applicant has not proven that water will be beneficially used for wildlife. Applicant did not present evidence to establish the amount of water needed for the use. Nor did Applicant present evidence to establish how the appropriator, other persons, or the public would benefit from the wildlife use when the wildlife are not under Applicant's control. (Department file, testimony of Tony Hensel, Memorandum [below])

10. Applicant has proven he has possessory interest in the property where the water is to be put to beneficial use. Hensel Land

Partnership owns the property and Phillip G. Hensel is a general partner. (Department file, Testimony of Tony Hensel)
Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (1999).
2. Applicant has not met the criteria for issuance of a beneficial water use permit. See Findings of Fact 8 and 9. Mont. Code Ann. §85-2-311 (1999).

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application For Beneficial Water Use Permit 40A-107356 by Hensel Land Partnership is hereby **DENIED**.

MEMORANDUM

The Applicant acknowledged the need to acquire a private fish pond license. There was testimony that fifty (50) fish would be placed in the proposed pond, but no evidence that fifty fish need this quantity of water. If water is to be set aside to sustain a beneficial use, it must be put to the use, and not be wasteful. That is, the pond must be stocked to the extent of the water right to create a viable fishery. Without evidence to justify the quantity of water requested for the fishery purpose, I am left relying upon the private pond license to justify the amount of water requested is necessary to create a viable fishery. The private pond license statute appears to be more concerned with the introduction of exotic species than the viability of the pond, or that the quantity of water requested is actually necessary for the proposed fishery (proposed pond). Simply put, acquisition of a private pond license in and of itself does not show the quantity of water requested is actually needed for Applicant's precise purpose. Intent specific (fish

numbers, species, etc) information is needed to make this showing. It was not provided.

In addition, Applicant did not explain how the fishery would be operated in times when there is no flow into the pond such as during a drought. Irrigated crops which do not receive water some years just produce less or go into a dormant state. Fish do not have that option; without the proper environment and water, they do not go dormant-they die. Diversion of water that may produce a pond of dead fish may not be a beneficial use of water. An explanation of how the operation of the fishery when there is no flow into the pond is beneficial is missing from the record.

The wildlife use associated with this project is not wildlife brought in by the applicant; nor has a specific amount of water to create a private wildlife habitat been identified. Instead an unknown number of area wildlife may use the pond. The applicant has not determined how much water is necessary to sustain the proposed wildlife use. Without such determination, a water right for this purpose cannot be granted. There may be private wildlife habitat licenses needed or available that could be used to indirectly quantify the proposed use; however, there was no testimony in that regard, and no condition to overcome that shortcoming.

The record does not reflect notice to the applicant that justification of the quantity of water for the fishery or wildlife use was required before a permit could be issued. Such justification must come from the use to which the water is put, not merely the size of the vessel into which the water is impounded. By reopening the record Applicant was afforded the opportunity to justify the amount of water requested for these uses.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 13th day of November, 2000.



Charles F Brasen
Hearing Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

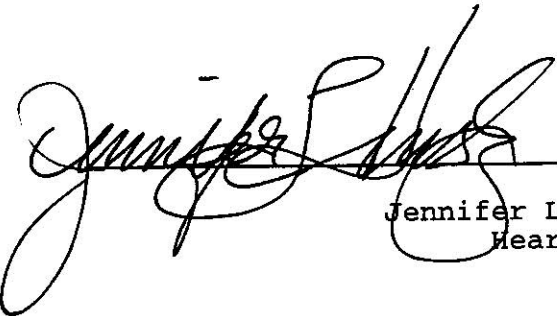
This certifies a true and correct copy of the Notice of Hearing Date was served upon all parties listed below this 15th day of November, 2000, as follows:

HENSEL LAND PARTNERSHIP
PO BOX 58
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